Supreme Court, U. S.
FILED
JUL 25 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED

.....TERM,.....

No. 75-137

WILLIAM W. GRUBB,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of
Appeals for the Seventh Circuit

JOHN E. GAMBILL, Esquire and D.J. KORKOWSKI
ALLEN & KORKOWSKI & ASSOCIATES
123-125 North Garrard Street
Rantoul, Illinois 61866

and

REINO C. LANTO, Esquire
P. O. Box 601
Rantoul, Illinois 61866

Attorneys for Petitioner

SUBJECT INDEX

Opinions Below 2

Jurisdiction 2

Questions Presented for Review 3

Constitutional and Statutory Provisions Involved 3

Statement of the Case 5

Reasons for Granting the Writ and Argument Amplifying the Same 7

I

Certiori Should be Granted to Resolve the Conflicting Decisions of Various United States Courts of Appeals as to Whether the Defense of Entrapment is Established When a Government Agent Supplies the Sum Total of the Contraband Upon Which a Conviction Is Based 7

II

Certiorari Should be Granted to Resolve Conflicting Decisions of Various United States Courts of Appeals as to Whether, Consistent With the Fifth Amendment to the Constitution of the United States, the Prosecutor May, on Cross-Examination of the Defendant, Ask Him Whether He Had Ever, Prior to Trial, Told His Exculpatory Version to Police or Prosecutorial Authorities When He (The Prosecutor) Knows the Defendant Made No Pre-Trial Statements Whatsoever 10

III

Certiorari Should be Granted to Determine Whether Defendant's Sixth Amendment Rights Were Violated by the Court Sending Hearsay Memoranda of Prosecution Witnesses to the Jury Room and to Resolve Conflicting Court of Appeal's Opinions on the Effect of Such Memoranda 13

IV

Certiorari Should be Granted to Determine Whether the Court's Failure to Instruct the Jury That Its Verdict Must be Unanimous Constituted Plain Error 15

Conclusion 17

INDEX TO APPENDICES

Appendix A. Indictment A-1

Appendix B. Opinion and Order of 7th Circuit A-3

Appendix C. Statutory Authority . . A-11

Appendix D. Constitutional Provisions Involved A-16

TABLE OF AUTHORITIES

Cases

Andres v. United States, 333 U. S. 740, 748, 68 S. Ct. 880, 884, 92 L. Ed. 1055 15
Fowle v. United States, 410 F. 2d 48 (9th Circuit, 1969). 11
Griffin v. California, 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d, 106 11
Grunewald v. United States, 353 U. S. 391, 77 S. Ct. 963, 1 L. Ed. 2d 931 (1957) 12
Hibdon v. United States, 204 F. 2d. 834 (6th Circuit, 1953) 15,16
United States v. Brinson, 441 F. 2d 1057 (6th Circuit, 1969). 11,13
United States v. Driscoll, 449 F. 2d. 894 (1971). 12
United States v. Frattini, 501 F. 2d. 1234 (2nd Circuit, 1974). . . . 14
United States v. Gomez-Rojas, 507 F. 2d. 1213 (1975). 9
United States v. Jett, 491 F. 2d. 1078 (1974) 10
United States v. Johnson, 495 F. 2d. 242 (1974). 9
United States v. Johnson, 484 F. 2d. 165 (1973) 10
United States v. Jones, 491 F. 2d. 526 pet. for reh. den. 491 F. 2d 529 (1974). 14
United States v. Kroslack, 426 F. 2d. 1129 (7th Circuit, 1970). . . . 12
United States v. Mahoney, 507 F. 2d. 1065 (1975) 9
United States v. McGrath, 494 F. 2d. 562 (7th Circuit, 1974) 9

United States v. Minichiello, 510 F. 2d. 576 (1975) 9
United States v. Moore, 484 F. 2d. 1284 (4th Circuit, 1973). . . . 11
United States v. Moseley, 496 2d. 1012 (1974) 9
United States v. Nolan, 10th Circuit, 1969 11
United States v. Parker, 491 F. 2d. 517, pet. for reh. den. 491 F. 2d. 529 (1974) 14,A-8
United States v. Pollard, 483 F. 2d. 929 (1973) 10
United States v. Ramirez, 441 F. 2d. 950 (1971) 12
United States v. Russell, 411 U. S. at 431 3,8,9
United States v. Sanchez, 293 F. 2d. 260 (8th Circuit, 1961) . .14,A-8
United States v. Sexton, 456 F. 2d. 951 (5th Circuit, 1972). . 15
United States, ex. rel. Smith v. Brierly, 384 F. 2d. 992, (3rd Circuit, 1967) 11
United States v. Soto, 504 F. 2d. 557 (1974). 9
United States v. Thomas, 449 F. 2d. 1177 (D. C. Circuit, 1971). . 15
United States v. Ware, 247 F. 2d. 698 (7th Circuit, 1957) 14,A-7,A-8,A-9
United States v. Wells, 506 F. 2d. 557 (1974). 9
United States v. West, 5.. F. 2d. 1083 (3rd Circuit, 1975). . . 9

Constitution and Statutes

United States Code, Title 28, Section 1732(a) 24,A-11

United States Code, Title 21, Section 812(a)(c), Schedule I(a)(c)(10), Schedule III(a)(1) 4,6,A-11
United States Code, Title 21. Section 841(a)(1)(2) and (b)(1)(B). 4,6,A-1,A-2,A-13
United States Code, Title 18, Section (2)(a)(b) . . .4,6,A-1,A-2,A-15

United States Constitution, Fifth Amendment . . .3,10,11,12,13,A-16

United States Constitution, Sixth Amendment 3,13,14,A-16

Miscellaneous

Fed. R. Crim. Proc. (Rule 31(a) and 52(b) 15,16

IN THE
SUPREME COURT OF THE UNITED STATES

.....TERM,.....

No.....

WILLIAM W. GRUBB,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of
Appeals for the Seventh Circuit

Petitioner, WILLIAM W. GRUBB, does respectfully pray for a Writ of Certiorari to issue to the United States Court of Appeals for the Seventh Circuit to review its judgment entered June 26, 1975 affirming the judgment of conviction of the United States District Court for the Eastern District of Illinois, by which Petitioner was sentenced as follows:

> To 3 years imprisonment, with 2-1/2 years suspended (probation) on condition that he be confined in prison or treatment facilities for 6 months, and a fine of $1,000.00

OPINIONS BELOW

Petitioner, WILLIAM W. GRUBB, was charged by indictment in the United States District Court for the Eastern District of Illinois on three counts of possession, with intent to distribute, of hashish, marijuana and amphetamine (Appendix A). After trial by jury, before the Honorable Henry S. Wise, Petitioner was convicted on all counts. Judgment thereon was entered by the Court on December 5, 1974. After denial of post-trial motions for new trial and probation, Petitioner was sentenced to be imprisoned for 3 years with 2-1/2 years suspended (probation) on condition that he be confined for 6 months and a fine of $1,000.00.

A timely appeal to the United States Court of Appeals for the Seventh Circuit was filed and docketed as number 75-1028. The judgment of the trial Court was affirmed by written opinion (unpublished) dated June 26, 1975 (attached hereto as Appendix B).

JURISDICTION

1. The date of the opinion and judgment of the United States Court of Appeals for the Seventh Circuit was June 26, 1972. (Appendix B).

2. The statutory authority which confers jurisdiction upon this Court to review the judgment in question by Writ of Certiorari is 28 U.S.C., Section 1254 (1)(Appendix C).

QUESTIONS PRESENTED FOR REVIEW

I

Whether the defense of entrapment is available to an accused who was supplied all the contraband upon which this conviction is based (as contrasted to a portion, or innocent ingredient, thereof as in UNITED STATES v. RUSSELL, infra) by a government agent?

II

Whether it is Constitutionally permissible for the United States Attorney to ask the defendant if he had told the police, magistrate, United States Attorney's Office, or anyone except his lawyer how he came in contact with the drugs?

III

Was it error to send hearsay memoranda of prosecution witnesses into the jury room?

IV

Did the Court's failure to instruct the jury that its verdict must be unanimous constitute plain error?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Fifth and Sixth Amendments to the Constitution of the United States are set forth in

Appendix "D".

Pertinent provisions of Titles:

18 U.S.C., Section 2;
21 U.S.C., Sections 812 and 841; and
28 U.S.C., Sections 1254 and 1732

are set forth in Appendix "C".

STATEMENT OF THE CASE

I

Evidence stands uncontradicted that a government agent supplied all of the contraband (drugs) involved in the present conviction.

II

On cross-examination of the defendant, the United States Attorney asked him whether he had, prior to trial, told his exculpatory version to the police, magistrate, United States Attorney's Office or anyone except his attorney.

III

Certain government exhibits were admitted over objection as chemists' reports of analysis. These exhibits also contained 21 blocks (filled out by narcotics agents) entitled "Report of Drug Property Collected, Purchased or Seized". This hearsay portion of the exhibits contained a synopsis of the facts surrounding the case and seizure as well as opinions as to the nature, quantity, price and origin (illicit and foreign) of the substances seized.

(Conflict in Circuits Fifth and Seventh v. Eighth.)

IV

The trial judge, in his charge failed to instruct the jury that its verdict had

to be unanimous, nor was this requirement of unanimity ever mentioned by the Court. Neither the Court nor the parties polled the jury after announcement of the verdict.

V

Jurisdiction of the trial Court (the United States District Court for the Eastern District of Illinois) over this cause is founded upon the indictment (Appendix B) alleging the defendant to be a principal in:

> Possessing with intent to distribute, hashish in violation of Title 21 U.S.C., Section 812(c), Schedule I(c)(10), Section 841(a)(1), Section 841 (b)(1)(B) and Title 18 U.S.C., Section 2 (Count I);
>
> Possessing with intent to distribute, marijuana in violation of Title 21 U.S.C., Section 812(c), Schedule I(c)(10), Section 841(a)(1), Section 841 (b)(1)(B), and Title 18 U.S.C., Section 2 (Count II); and
>
> Possessing with intent to distribute amphetamine in violation of Title 21 U.S.C., Section 812 (c), Schedule III(a)(1), Section 841 (a)(1), Section 841 (b)(1)(B), and Title 18 U.S.C., Section 2.

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING THE SAME

I

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICTING DECISIONS OF VARIOUS UNITED STATES COURTS OF APPEALS AS TO WHETHER THE DEFENSE OF ENTRAPMENT IS ESTABLISHED WHEN A GOVERNMENT AGENT SUPPLIES THE SUM TOTAL OF THE CONTRABAND UPON WHICH A CONVICTION IS BASED.

In the trial court, it was established, without contradiction, that a government agent initially supplied all the contraband (drugs) forming the basis for defendant's conviction. The prosecution neither called the government agent, nor produced any evidence whatsoever to rebut the allegation that he had supplied all the drugs in question. At the close of proofs, the defense tendered the Court an instruction (embodying this theory of entrapment) in the following language:

> "You are advised that unless you are satisfied beyond a reasonable doubt that Don Perry (the government agent) did not supply the contraband in this case, you must find the Defendants not guilty."

The Court refused to give the requested instruction holding that such was not the law. The United States Court of Appeals for the Seventh Circuit agreed and affirmed the conviction (Appendix B, p. 3).

UNITED STATES v. RUSSELL, supra, supposedly laid to rest the motion that entrapment could, alone, be predicated upon actions of the government in supplying necessary elements of a criminal venture since RUSSELL specifically reaffirmed predisposition as the principal element of entrapment (411 U. S. at 433). However, RUSSELL also specifically recognized that the Court was not faced with the situation (as we are in the present case) wherein the total contraband per se (not merely a licit ingredient thereof) was supplied by government agents. In making that distinction this Court said:

> "Thus, the facts in the record amply demonstrate that the propanone used in the illicit manufacture of methamphetamine not only could have been obtained without the intervention of Shapiro but was in fact obtained by these Defendants. While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the Government from invoking judicial processes to obtain a conviction...the instant case is distinctly not of that breed. Shapiro's contribution of propanone to the criminal enterprise already in process was scarcely objectionable. The chemical is by itself a harmless substance and its possession is illegal." 411 U.S. at 431, 432.

This very distinction subtly, though forcefully, sets the present case apart

from RUSSELL -- here the government provided the sine qua non of the offense.

The Fifth Circuit Court of Appeals has consistently recognized that distinction and holds RUSSELL inapposite to cases (such as ours) in which the government supplies the total substance of the crime.

This "BUENO-OQUENDO" variant of the entrapment defense (MINICHIELLO, supra at 577) was very recently examined (in view of RUSSELL, supra) and specifically adopted by the Third Circuit Court of Appeals in a case remarkably similar to the present. UNITED STATES v. WEST, 511 F. 2d, 1083 (3d Circuit, 1975). Moreover, the Tenth Circuit appears now to favor the same approach. UNITED STATES v. JOHNSON, 495 F. 2d, 242 (1974) citing UNITED STATES v. RUSSELL, supra.

Opposed to this view are four Circuits. The Seventh Circuit, in the present case, agreed with the trial court's refusal to instruct on the BUENO-OQUENDO entrapment defense (the offered instruction being virtually identical to one approved in MINICHIELLO, supra at 578) holding that such was not the law (Appendix B). See also UNITED STATES v. MCGRATH, 494 F. 2d, 562 (7th Circuit, 1974).

UNITED STATES v. MINICHIELLO, 510 F. 2d, 576 (1975); UNITED STATES v. GOMEZ-ROJAS, 507 F. 2d, 1213 (1975); UNITED STATES v. MAHONEY, 507 F. 2d 1065 (1975); UNITED STATES v. WELLS, 506 F. 2d 924 (1975); UNITED STATES v. SOTO, 504 F. 2d, 557 (1974) and UNITED STATES v. MOSELEY, 496 F. 2d, 1012 (1974).

The First Circuit (UNITED STATES v. JETT, 491 F. 2d, 1078 (1974)), Ninth Circuit (UNITED STATES v. JOHNSON, 484 F. 2d, 165 (1973)), and Eighth Circuit (UNITED STATES v. POLLARD, 483 F. 2d, 929 (1973)), along with the Seventh Circuit appear to focus entirely on the subjective (predisposition) test, as opposed to the objective (BUENO-OQUENDO) test of entrapment.

It is therefore urged that the trial Court erred in refusing to instruct the jury on the BUENO-OQUENDO theory of entrapment and that Certiorari should be granted to resolve the confusion among the various Courts of Appeal on that issue.

II

CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICITNG DECISIONS OF VARIOUS UNITED STATES COURTS OF APPEALS AS TO WHETHER, CONSISTENT WITH THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, THE PROSECUTOR MAY, ON CROSS-EXAMINATION OF THE DEFENDANT, ASK HIM WHETHER HE HAD EVER, PRIOR TO TRIAL, TOLD HIS EXCULPATORY VERSION TO POLICE OR PROSECUTORIAL AUTHORITIES WHEN HE (THE PROSECUTOR) KNOWS THE DEFENDANT MADE NO PRE-TRIAL STATEMENTS WHATSOEVER.

At trial, the United States Attorney cross-examined the defendant with regard to his exculpatory explanation for the presence of drugs in his house and asked the following questions:

Q. Did you ever upon your arrest or any other time tell the police, at the preliminary hearing or anywhere else to anybody except to your lawyer, about how you came in contact with these drugs?

A. How I came in contact with these drugs?

Q. Yes. You are telling this jury that you innocently came into contact with them. Did you ever tell that to the people that arrested you, to the Champaign police, to the magistrate, to the United States Attorney's Office, to anybody?

Defense Counsel's immediate objection was sustained without further comment or curative instruction by the Court.

It is beyond dispute that the Fifth Amendment to the United States Constitution prohibits any prosecutorial comment on an accused's election not to testify. GRIFFIN v. CALIFORNIA, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106. Various Circuits have extended this ban to exclude evidence of, or prosecutorial comment upon, a defendant's failure to explain his conduct to police or prosecutorial officials. UNITED STATES v. MOORE, 484 F. 2d, 1284 (4th Circuit, 1973); UNITED STATES v. BRINSON, 411 F. 2d, 1057 (6th Circuit, 1969); FOWLE v. UNITED STATES, 410 F. 2d, 48 (9th Circuit, 1969); UNITED STATES v. NOLAN, (10th Circuit, 1969); UNITED STATES, ex. rel.

SMITH v. BRIERLY, 384 F. 2d, 992 (3d Circuit, 1967); see also UNITED STATES v. KROSLACK, 426 F. 2d, 1129 (7th Circuit, 1970); see also GRUNEWALD v. UNITED STATES, 353 U. S. 391, 77 S. Ct. 963, 1 L. Ed. 2d 931 (1957).

Other Circuits, notably the First (UNITED STATES v. DRISCOLL, 449 F. 2d, 894 (1971)), and the Fifth (UNITED STATES v. RAMIREZ, 441 F. 2d, 950 (1971), reh. den. en. banc. (1971)), hold that such questions on cross-examination of defendant are proper since:

> "...Once (the defendant) elected to testify and assert...(a) defense, he became subject to the traditional truth testing devises of, the adversary process including the right of the prosecution to show his prior inconsistent act of remaining silent at the time of his arrest." UNITED STATES v. RAMIREZ, supra at 954.

Since the prosecutor in the present case was well aware that the defendant had made no pre-trial statements to authorities, only one purpose can be ascribed to his questions...to move the jury to infer guilt from Defendant's exercise of his Constitutional right to remain silent. It matters not that the questions were not answered since the mere asking, coupled with a defense objection, is logically equivalent (in the jury's mind) to the answer. Since defendant "...had no duty to disclose his defense to any law enforcement officer or

prosecuting authority, permitting the inquiry pursued at trial by the United States Attorney was error of Constitutional magnitude..." UNITED STATES v. BRINSON, supra, at 1060.

It is therefore urged that the aforementioned questions of the United States Attorney constituted Constitutional error and that Certiorari should be granted to settle the conflicting Court of Appeal's opinions on that issue.

III

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER DEFENDANT'S SIXTH AMENDMENT RIGHTS WERE VIOLATED BY THE COURT SENDING HEARSAY MEMORANDA OF PROSECUTION WITNESSES TO THE JURY ROOM AND TO RESOLVE CONFLICTING COURT OF APPEAL'S OPINIONS ON THE EFFECT OF SUCH MEMORANDA.

At trial, three government exhibits purporting to be chemist's reports of analysis were admitted (over objection) as business records establishing the nature of the substances seized. Certain blocks on each form (block numbers 1-21) entitled "Report of Drug Property Collected, Purchased or Seized" were completed by participating narcotics agents and contained a synopsis of the events surrounding the seizure, as well as the amounts, value, type and origin of the substances seized.

Such memoranda do not qualify as "business records" and are therefore nothing more than hearsay statements providing the jury with a neat synopsis of the prosecution case. As such, their admission has been held prejudicial error per se, even when merely cumulative of trial testimony. UNITED STATES v. WARE, 247 F. 2d, 698 (7th Circuit, 1957); UNITED STATES v. FRATTINI, 501 F. 2d, 1234 (2d Circuit, 1974); UNITED STATES v. SANCHEZ, 293 F. 2d, 260 (8th Circuit, 1961).

Recent Eighth Circuit decisions, however, indicate admission of such memoranda to be harmless error where merely cumulative of trial testimony. UNITED STATES v. PARKER, 491 F. 2d 517, pet. for reh. den. 491 F. 2d 529 (1974); UNITED STATES v. JONES, 491 F. 2d, 526 pet. for reh. den. 491 F. 2d 529 (1974). Even though the memoranda in the present case were more than just cumulative, the Seventh Circuit Court of Appeals found them non-prejudicial in view of the admission of guilt implicit in Defendant's defense of entrapment (Appendix B, p. 3).

It is here urged that admission of these memoranda was error depriving Defendant of his Sixth Amendment right to confront the witnesses against him. Certiorari should be granted to decide that issue and to resolve the conflicting decisions among the Courts of Appeal as to the effect of such memoranda.

IV

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE COURT'S FAILURE TO INSTRUCT THE JURY THAT ITS VERDICT MUST BE UNANIMOUS CONSTITUTED PLAIN ERROR.

After arguments, the Court instructed the jury, however, nowhere in its charge (nor at any point during trial) did it mention voting procedure or the necessity for a unanimous verdict. No objection was interposed to this ommission, nor was the jury polled after returning the verdict in open Court.

It has long been held (with no authority to the contrary) that a criminal defendant has an absolute -- and indeed unwaivable -- right to an unanimous verdict. ANDRES v. UNITED STATES, 333 U. S. 740, 748, 68 S. Ct. 880, 884, 92 L. Ed. 1055: UNITED STATES v. SEXTON, 456 F. 2d, 961 (5th Circuit, 1972); UNITED STATES v. THOMAS, 449 F. 2d, 1177, (D. C. Circuit, 1971; HIBDON v. UNITED STATES, 204 F. 2d, 834 (6th Circuit, 1953); FED. R. CRIM. PROC., Rule 31(a). Though statutes may alter this requisite, it remains an absolute mandate in the Federal Courts; indeed, it seems still to be considered to be "...inextricably interwoven with the required burden of proof..." HIBDON v. UNITED STATES, supra at 838.

It is, of course, a logical condition precedent to the jury's fulfillment of the requirement of unanimity, that it be informed of its existence. In the pre-

sent case, that was not done. The jury retired to deliberate without so much as a judicial hint that all must agree in the verdict. It can not be presumed that the jury was aware its verdict need be unanimous any more than one could presume the jury to be aware of the elements of an offense. Since the right to a unanimous verdict in a criminal trial is a substantial right interwoven with constitutional guarantees (HIBDON v. UNITED STATES, supra) it is not waived by failure to object, and its absence constitutes "plain error" (under Rule 52(b), FED. R. CRIM. P.) such that if left uncorrected would result in manifest miscarriage of justice or affect seriously the fairness of judicial proceedings, nor can the fact that all twelve jurors signed the verdict cure the error as the Seventh Circuit's opinion (Appendix B, p. 4) indicates. There is simply no way of knowing whether the verdict was by simple majority or unanimity since the signatures of all twelve is an ambiguous act. It could just as easily reflect the acquiescence of a minority to the decision of a majority, as it could reflect unanimity.

THEREFORE, the Court's failure to so charge the jury was plain error and Certiorari should be granted.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

John E. Gambill
Attorney for Petitioner
and D.J. KORKOWSKI

Reino C. Lanto
Attorney for Petitioner

JOHN E. GAMBILL, Esquire
ALLEN & KORKOWSKI & ASSOCIATES
123-125 North Garrard Street
Rantoul, Illinois 61866

and

REINO C. LANTO, Esquire
P. O. Box 601
Rantoul, Illinois 61866

APPENDIX

APPENDIX A

CRIMINAL NO. 74-36-D
Sections 812(c), Schedule I(c)(10), Schedule III(a)(1), 841(a)(1) and 841(b)(1)(B), Title 21, Section 2, Title 18, United States Code.

UNITED STATES OF AMERICA, Plaintiff, v. WILLIAM W. GRUBB and MICHAEL F. WOODS, Defendants.

THE GRAND JURY CHARGES:

COUNT I

On or about the 5th day of August, 1974, in the Eastern District of Illinois, WILLIAM W. GRUBB and MICHAEL F. WOODS, acting together and aiding and absetting each other, knowingly and intentionally did then and there unlawfully possess with intent to distribute about 436.2 grams of Hashish, a Schedule I controlled substance; in violation of Title 21, United States Code, Sections 812(c), Schedule I(c)(10), 841(a)(1), 841(b)(1)(B), and Title 18, United States Code, Section 2.

COUNT II

On or about the 5th day of August, 1974, in the Eastern District of Illinois, WILLIAM W. GRUBB and MICHAEL F. WOODS, acting together and aiding and abetting each other, knowingly and intentionally did then and there unlawfully possess with intent to distribute about 717.1 grams of Marijuana, a Schedule I contolled substance;

in violation of Title 21, United States Code, Sections 812(c), Schedule I(c)(10), 841(a)(1), 841(b)(1)(B), and Title 18, United States Code, Section 2.

COUNT III

On or about the 5th day of August, 1974, in the Eastern District of Illinois, WILLIAM W. GRUBB and MICHAEL F. WOODS, acting together and aiding and abetting each other, knowingly and intentionally did then and there unlawfully possess with intent to distribute about 3,000 tablets of Amphetamine, a Schedule III controlled substance; in violation of Title 21, United States Code, Sections 812(c), Schedule III (a)(1), 841(a)(1), 841(b)(1)(B), and Title 18, United States Code, Section 2.

A TRUE BILL

/S/ H. L. Reed
FOREMAN

/S/ Henry Schwartz
UNITED STATES ATTORNEY

BOND: $5,000.00 OR WILLIAM W. GRUBB

BOND: $5,000.00 OR MICHAEL F. WOODS

APPENDIX B

OPINION AND ORDER OF 7TH CIRCUIT

Argued -- May 28, 1975
Decided -- June 26, 1975

BEFORE:
Hon. ELBERT P. TUTTLE, Senior Circuit Judge*
Hon. PHILIP W. TONE, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

Appeal from the United States District Court for the Eastern District of Illinois. No. CR 74-37-D
Hon. Henry S. Wise, Judge

Docket Nos. 75-1028 and 75-1029

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIAM W. GRUBB and MICHAEL F. WOODS, Defendants-Appellants.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, Danville Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of this Court filed this date.

*Honorable ELBERT P. TUTTLE, Senior Circuit Judge for the Fifth Circuit is sitting by designation.

ORDER

This is an appeal by two defendants from a conviction for three counts of aiding and abetting each other in possession with intent to distribute 436.2 grams of hashish, 717.1 grams of marijuana, and about 3,000 amphetamine tablets. Several alleged errors are raised and shall be considered in the same order as raised in the appellants' brief and argument.

Prior to trial, defendant Grubb moved to exclude mention of his gun. The motion was granted. The gun in question was hidden under a pillow and was displayed to the Drug Enforcement Administration Agent by the defendant, Grubb.

During the trial, the agent testified that Grubb lifted the pillow and something was beneath it. No mention of a gun was made. A timely objection was overruled. Without comment on the ruling on the motion in limine, we agree that the ruling was not violated and the evidence did not constitute error.

The defendant Grubb also objects to the cross-examination of the defendant with reference to whether he had told anyone except his lawyer how he came in contact with the drugs. The record shows that Grubb testified that he had received the drugs from his daughter and was waiting for someone to come and remove them from the home. This explanation was offered to show the innocent possession and we disagree that the question was reversible error. An objection to the question was sustained and no further motion made. The fact is that the defendant was never

interrogated and never raised his Fifth Amendment privilege, nor can we say the question asked raised such an implication.

Next, the defendant Grubb complains of certain direct examination questions during rebuttal. The record shows that the questions objected to were as follows:

> "Q. Did defendant Grubb ever approach you since his arrest and make any statements to you?
> MR. GAMBILL: Objection, Your Honor, beyond the scope of the examination.
> THE COURT: Sustained.
> BY MR. WHITE:
> Q. Since the arrest on August 5th has anyone requested to become an informant?
> MR. AULER: Objection.
> THE COURT: Sustained.
> MR. GAMBILL: Your Honor, we make a motion for a mistrial.
> MR. AULER: I join that motion.
> MR. GAMBILL: I still fail to see how this has any relevance.
> THE COURT: I sustained the objection."

The objections to the question were as to the scope of the direct examination and the relevance, not to prejudice. Assuming the motion for a mistrial to be one raising the question of prejudice, the questions do not create reversible error. The innocent-possession theory of the defense raised certain questions that might well be explored by the prosecution. Without discussing the artfullness of the examination, we can only state that the

examination complained of does not constitute reversible error. The trial court correctly denied the motion for the mistrial.

Next, the defendants complain of the cross-examination of defense witnesses Donna Loe and Kathy Grubb. Loe testified on direct examination that she witnessed drug use by the government agents. The question complained of is as follows:

> "Q. Of course, you don't use drugs yourself?
> A. No, I do not."

Witness Kathy Grubb, daughter of defendant Grubb, testified that she had possession of the drugs in question for about a month. On cross-examination, the following appears:

> "Q. Have you ever used drugs yourself?
> A. No, sir."

Neither of the above questions or answers were objected to or preserved for the assignment of error. Considering the totality of the testimony of the two witnesses, we are unable to state that, had timely objections been made, the questions and answers were error.

The defendants next raise the refusal of the court to grant a directed verdict of acquittal at the close of the evidence in the case as error. The theory is, apparently, that since the source of the drugs was -- according to the defense -- a government informer, that entrapment existed as a matter of law. We disagree.

The question of entrapment, considering the evidence, was one of fact and the jury was properly instructed on the subject of entrapment. The instruction as tendered by the defendant was not the law on the subject. The categorical pre-emptive requested by the defendant was as follows:

> "You are advised that unless you are satisfied beyond a reasonable doubt that Don Perry (the informer) did not supply the contraband in this case you must find the defendants not guilty."

This instruction was properly refused by the trial court.

The defendants further assign as error the admission of government exhibits which were the drugs in question and the work sheets of the chemist who analyzed these drugs. Proper foundation was laid for the introduction of these exhibits. The hearsay problem is adequately disposed of by the case of United States v. Ware, 247 F. 2d 698 (1957) as it relates to the question of chemist's reports being business records. As to the question of the notations contained on these reports, we have examined the documents and find that they contained statements that were not in issue during the trial and therefore do not come within the prohibitation enunciated in United States v. Ware, supra.

The notations provided a shorthand summary of the type of drugs seized, when they were taken, and in whose possession they were found. Normally we would con-

sider the admission of such notations to be reversible error. However in this case the defendant acknowledged these facts by virtue of his defense of entrapment. There was no dispute as to these facts since the defendants would have to substantially agree to the facts in order to raise the defense of entrapment.

The notations complained of in the instant case do not provide "a neat condensation of the government's case against the defendant." The notations merely repeat facts which had already been received in evidence; facts that were conceded by all. United States v. Ware, supra and Sanchez v. United States, 293 F. 2d 260 (8th Circuit, 1961) stand for the principal that a conviction must be reversed if the overall result is the government's witnesses are in effect accompanying the jurors in the jury room. Clearly that was not the net effect in this case since the jury could leave behind the entrapment defense.

In this case we tend to agree with United States v. Parker, 419 F. 2d 517 (8th Circuit, 1973) wherein the Court considering this exact same problem stated:

> "Considerable discretion in sending exhibits to the jury must be granted the trial court. Probative value of evidence admitted must be weighed against possible prejudice that may result if the exhibits are sent to the jury.

> The trial judge who has heard the evidence and observed at first hand the issues as they developed during the trial can best determine whether exhibits should be received and sent to the jury. We should not interfere unless there is a clear abuse of discretion."

The defendants complain further that the argument of the prosecutor was in error in many respects. No objections were made to certain of these arugments and the points were therefore not preserved for review. Our examination of the arguments by both sides show that the remaining points of the prosecutor's argument were either reasonable inferences to be drawn from the evidence or were responses invited by the argument of the defense and therefore did not constitute error. Vigorous argument, if not unfair, is not the basis for reversal. On those occasions where objection was made, the court, where appropriate, sustained the objections to specific arguments and, when requested, instructed the jury to disregard the argument. No reversible error, then, is found in the argument of counsel.

Further, the jury was thoroughly and properly instructed as to the elements of the entire case -- including a proper definition of the presumption of innocence. We believe, however, that when counsel paraphrases the law that will be the subject of a court's instruction, care should be taken to insure the accuracy of such paraphrase. Nevertheless, the court promptly sustained an objection when the

prosecutor wandered into his own version of the presumption of innocence and, as we have pointed out, properly instructed the jury.

Next, the defendants complain that the jury was not instructed that a unanimous verdict was required. No such instruction was tendered, no objection to the charge on that ground made, and the jury returned a verdict signed by all twelve jurors. We conclude that any error that existed by the absence of an instruction on the subject of a unanimous verdict was, under the circumstances, harmless.

Lastly, the defendant Woods complains that the government failed to rebut what he described as an "affirmative defense of insanity." The testimony of the psychiatrist called in support of this defense was less than convincing on this point and essentially described the defendant's condition as seriously depressed. The court properly instructed the jury on the subject of the defense of insanity. The best that can be said of this phase of the case is that the record fails to disclose that, as a matter of law, the defendant had raised a reasonable doubt as to this sanity. The jury resolved this question as a matter of fact by the return of the verdict of guilty.

For the reasons above stated, the convictions appealed from are affirmed.

AFFIRMED.

APPENDIX C

STATUTORY AUTHORITY

Title 28, U.S.C., Section 1732(a):

(a) In any court of the United States and in any Court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event shall be admissible as evidence of such act, transaction, occurrence or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall affect its admissability.

The term "business" as used in this Section, includes business, profession, occupation and calling of every kind.

Title 21, U.S.C., Section 812 (a)(c), Schedule I(a)(c)(10), Schedule III(a)(1):

(a) There are established five Schedules of controlled substances, to be known as Schedules I, II, III, IV and V. Such Schedules shall initially consist of the substances listed in this Section. The

Schedules established by this Section shall be updated and republished on a semi-annual basis during the two-year period beginning one year after the date of enactment of this Subchapter and shall be updated and republished on an annual basis thereafter.

(c) Schedules I, II, III, IV and V shall, unless and until amended pursuant to Section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

SCHEDULE I

(a) Unless specifically excepted or unless listed in another Schedule, any of the following opiates, including their isomers, esters, ethers, salts and salts of isomers, esters, ethers and salts is possible within the specific chemical designation:

(c) Unless specifically excepted or unless listed in another Schedule, any material, compound, misture or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers and salts of isomers whenever the existence of such salts, isomers and salts of isomers is possible within the specific checmical designation:

(10) Marijuana

SCHEDULE III

(a) Unless specifically excepted or unless listed in another Schedule, any material,

compound, mixture or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous sytem:

(1) Amphetamine, its salts, optical isomers and salts of its optical isomers.

Title 21, U.S.C., Section 841(a)(1)(2) and (b)(1)(B):

(a) Except as authorized by this Subchapter, it shall be unlawful for any person knowingly or intentionally:

(1) To manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance, or

(2) To create, distribute, or dispense, or possess with intent to distribute or dispense, a controlled substance.

(b) Except as otherwise provided in Section 845 of this Title, any person who violates Subsection (a) of this Section shall be sentenced as follows:

(1) In the case of a controlled substance in Schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more then 15 years, a fine of not more than $25,000 or both. If any person commits such a violation after one or more prior

convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this Subchapter or Subchapter II of this Chapter or other law of the United States relating to narcotic drugs, marijuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000 or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in Schedule I or II which is not a narcotic drug or in the case of any controlled substance in Schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000 or both...Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term

of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

Title 18, U.S.C., Section 2(a)(b):

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

APPENDIX D

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution -- Amendment V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use, without just compensation.

United States Constitution -- Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Supreme Court, U. S.
FILED
OCT 30 1975
MICHAEL RODAK, JR., CLERK

No. 75-137

In the Supreme Court of the United States

OCTOBER TERM, 1975

WILLIAM W. GRUBB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-137

WILLIAM W. GRUBB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that (1) the jury was improperly instructed on the issue of entrapment; (2) the prosecutor impermissibly asked petitioner if he had ever told his exculpatory version of the case to anyone prior to trial; (3) certain chemist's reports were improperly admitted into evidence; and (4) it was plain error for the district court not to instruct the jury that its verdict must be unanimous.

Following a jury trial in the United States District Court for the Eastern District of Illinois, petitioner and co-defendant Michael F. Woods were convicted of possessing, with intent to distribute, hashish (count 1), marijuana (count 2), and amphetamines (count 3), in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Pet. App. A-1 to A-2, A-4). Petitioner was sentenced on count 1 to six months' imprisonment to be followed by two-and-one-half years' probation, and fined $1,000. On counts

2 and 3 he was sentenced to concurrent terms of three years' probation, to run consecutively to the sentence imposed on count 1. The court of appeals affirmed (Pet. App. B).

At trial, the government showed that petitioner engaged in a drug transaction with an undercover agent of the Drug Enforcement Administration ("DEA") and agreed to further such transactions (Tr. 10-46). Both petitioner and his daughter testified on his behalf. Their story was that the drugs involved had originated with the government informant who introduced petitioner to the DEA agent involved in the transaction for which petitioner was arrested and convicted. They testified that the informant had asked Ms. Grubb's boyfriend to hold the drugs temporarily, and that Ms. Grubb in turn had agreed to hold the drugs herself. Petitioner allegedly discovered the drugs in her bedroom and ordered her to dispose of them. Petitioner testified that when the DEA agent and co-defendant Woods arrived at his house on the evening of petitioner's arrest, petitioner assumed that they were there to pick up the drugs he had discovered in his daughter's room. Petitioner denied discussing future sales of the drugs with the undercover agent (Tr. 250-275).

1. Petitioner claims that the district court should have instructed the jury to acquit unless they found that the government informant did not supply the narcotics.

In *Hampton* v. *United States,* No. 74-5822, certiorari granted March 31, 1975, the issue is whether the government may constitutionally convict a defendant for selling contraband that he procured from a government agent or informant. There is no need to hold the instant petition pending the outcome of that case, however, since regardless of how *Hampton* is decided, the court of appeals was correct in holding that on the facts of this case the requested instruction would have been improper.

Assuming that the narcotics involved in this case originated with the government informant, the defense evidence itself showed that the narcotics did not pass directly from the informant to petitioner but, rather, through a series of unforeseen transfers, from the informant via an agreement with petitioner's daughter's boyfriend to petitioner's daughter, and finally to petitioner himself. There is no evidence to indicate that the government informant intended or even suspected that the narcotics he asked petitioner's daughter's boyfriend to hold would end up in petitioner's hands. In these circumstances the rationale of *United States v. Bueno,* 447 F. 2d 903 (C.A. 5), upon which petitioner principally relies, does not apply, as the Fifth Circuit itself has held in *United States* v. *Rodriguez,* 474 F.2d 587, 589:

> *Bueno* will not support the theory that the introduction of narcotics into the marketplace by the Government informer is sufficient to cloak all subsequent sellers with an entrapment defense. Being once removed from the person to whom the the cocaine was furnished by a Government informer. Rodriguez cannot claim entrapment as a matter of law. He obtained the contraband from a non-government source, and that fact alone is sufficient to distinguish his defense from Bueno's.

Accordingly, under any version of the entrapment defense or the related due process defense, the district court here properly refused to give the instruction requested by petitioner, and the issue does not merit further review.

2. Petitioner claims next that his conviction should be reversed because the prosecutor asked him on cross-examination whether he had ever told his exculpatory version of the events at issue to anyone prior to trial.

Petitioner's objection to this line of questioning was sustained, petitioner did not respond to the inquiry,[1] and the prosecutor did not mention the issue again, either in further cross-examination or in closing argument.

This case is distinguishable from *United States* v. *Hale*, No. 74-364, decided June 23, 1975, where this Court held, in the exercise of its supervisory powers, that it was error for the district court to allow cross-examination of the defendant concerning his silence during police interrogation at the time of his arrest. In *Hale* the defendant actually admitted, in response to the prosecutor's question, that he had not previously related his exculpatory version of events to the police. Here, in contrast, petitioner's objection to the prosecutor's inquiry was sustained prior to any response by petitioner, and, as the court of appeals ruled (Pet. App. A-4 to A-5), it cannot be said that the mere inquiry necessarily led the jury to believe that petitioner had relied on his Fifth Amendment privilege against self-incrimination at the time of his arrest. Similarly, the inquiry alone would not necessarily have caused the jury to believe either that petitioner had not, at some previous point, told his exculpatory story or, if he had not,

---

[1]The relevant colloquy was as follows (Tr. 285-286):

Q. Did you ever upon your arrest or any other time tell the police, at the preliminary hearing or anywhere else to anybody except to your lawyer, about how you came in contact with these drugs?

A. How I came in contact with these drugs?

Q. Yes, You are telling this Jury that you innocently came into contact with them. Did you ever tell that to the people that arrested you, to the Champaign Police, to the magistrate, to the United States Attorney's office, to anybody?

At this point petitioner objected, and his objection was sustained.

that his reasons for not doing so cast doubt upon the veracity of his trial testimony.[2]

Furthermore, petitioner did not move for a mistrial or even request a curative instruction in regard to the prosecutor's question. Since petitioner was content with the sustaining of his objection and chose not to present this issue (of prejudice inherent in the question itself) to the district court, which was in the best position to judge what impact, if any, the prosecutor's inquiry might have had, and what response might have been appropriate, petitioner must be held to have waived the point absent plain error. We submit that the inquiry by the prosecutor, standing alone, was not so prejudicial that it could not have been cured by an instruction to the jury to disregard it. Accordingly, there was no plain error, and further review by this Court is unwarranted.[3]

---

[2]*Hale* is also distinguishable on the ground that the prosecutor's inquiry in this case did not emphasize petitioner's silence in the face of police questioning at the time of arrest, but inquired equally into his refusal to tell any government official of his exculpatory version at any other time prior to trial, when "the inherent pressures" faced by an arrestee at "the time of arrest and during custodial interrogation" (*Hale, supra,* slip op. 5, 6) would not have existed. In our view, a defendant's failure to present his version of events during these times prior to trial, and his reasons for keeping silent, are not so inherently unreliable that they should not be presented to the jury for whatever evidentiary value the jury may choose to assign them.

[3]The fact that petitioner did not respond to the prosecutor's inquiry also distinguishes this case from *Doyle* v. *Ohio*, No. 75-5014, and *Wood* v. *Ohio*, No. 75-5015, certiorari granted October 6, 1975, in which this Court has agreed to decide *Hale*-type issues arising in the context of state criminal proceedings. In both those cases the prosecutor apparently succeeded in eliciting from the defendant that he had never previously related his exculpatory version of events (Pet. No. 75-5014, at 11-12; Pet. No. 75-5015, at 12). Moreover, the prosecutor also argued in summation that the jury was free to draw inferences unfavorable to the defendant from his failure to tell his story before trial. Given these factual distinctions, there is no need for this Court to hold the instant case pending disposition of *Doyle* and *Wood*.

3. Petitioner claims that the forensic chemist's written analyses of the narcotics seized from petitioner should not have been introduced in evidence because at the top of each of the three reports there appeared a brief summary by the arresting officer of the circumstances of the seizure.[4] As the court of appeals noted, however (Pet. App. A-7 to A-8), petitioner had acknowledged by his entrapment defense the facts surrounding his arrest and the seizure of the narcotics, and therefore the admission of the reports was not prejudicial to him in any way. That the admission of the reports was not error was adequately explained by the court of appeals (*id.* at A-8 to A-9), upon whose opinion we rely:

> The notations complained of in the instant case do not provide "a neat condensation of the government's case against the defendant." The notations merely repeat facts which had already been received in evidence; facts that were conceded by all. United States v. *Ware,* * * * [247 F.2d 698 (C.A. 7)] and *Sanchez* v. *United States,* 393 F.2d 260 (8th Circuit, 1961) stand for the principal [*sic*] that a conviction must be reversed if the overall result is the government's witnesses are in effect accompanying the jurors in the jury room. Clearly that was not the net effect in this case * * * .
>
> * * * * *
>
> "Considerable discretion in sending exhibits to the jury must be granted the trial court. Probative value of evidence admitted must be weighed against possible prejudice that may result if the exhibits are sent to the jury. The trial judge who has heard the evidence and observed at first hand the issues

[4]We are lodging copies of the reports with the Clerk of this Court.

> as they developed during the trial can best determine whether exhibits should be received and sent to the jury. We should not interfere unless there is a clear abuse of discretion."[5]

4. Petitioner claims that the court's failure to instruct the jury that their verdict must be unanimous constituted plain error. Petitioner never tendered such an instruction, nor objected to the court's failure to give it, nor asked that the jury be polled following the return of its verdict. Moreover, the verdict was signed by all twelve jurors. In these circumstances the court of appeals correctly concluded (Pet. App. A-10) that any error that existed because of the absence of an instruction on unanimity was harmless.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

[5]Petitioner's reliance on *United States* v. *Frattini,* 501 F.2d 1234 (C.A. 2), is misplaced, since in that case there was no claim of entrapment; rather, the defendant asserted that no narcotics transaction had occurred at all, and the contested exhibit contained evidence not already admitted and, as the court found, inadmissible